No. 16,104

United States Court of Appeals

For the Ninth Circuit

States Marine Corporation of Delaware, a corporation,

Appellant,

vs.

Victory Carriers, Inc., a corporation, and Shipowners & Merchants Towboat Co., Ltd., a corporation, Claimant of the Tug Sea Scout,

Appellees,

and

Shipowners & Merchants Towboat Co., Ltd.,

Appellant,

vs.

Victory Carriers, Inc., a corporation,

Appellee.

PETITION FOR REHEARING

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PETITION FOR REHEARING

To the Honorable Clifton Mathews, Walter L. Pope and Gilbert H. Jertberg, Judges of the Court of Appeals for the Ninth Circuit:

Appellant State Marine Corporation of Delaware hereby respectfully petitions for rehearing upon the Judgment of Affirmance entered herein October 22, 1959.

GROUNDS FOR THE PETITION

I.

EVEN IF BOUND BY A PILOTAGE CLAUSE VICTORY CARRIERS, INC. WOULD HAVE BEEN ENTITLED TO RECOVER FULL DAMAGES FROM RED STACK BECAUSE:

(a) The fault of the Red Stack pilot is not imputable to Victory Carriers.

This Honorable Court in its opinion of October 22, 1959, at page 11, expressed its view that "A shipowner bound by this pilotage clause, where the pilot was at fault, would hardly be in the position of the cargo owners in that case [The Chattahoochee, 173 U.S. 540], who were completely without either fault or control of any kind."

It is respectfully submitted that the Court erred in viewing the pilotage clause, if binding, as effective to impute to the shipowner any negligence of the Red Stack employee serving as pilot. Pilotage clauses are effective only as a release from liability for pilot negligence as held in *United States v. Nielson* (1955), 349 U.S. 129 and as recognized by this Honorable Court in its opinion of October 22, 1959 at pp. 10, 11.

Here there was no fault actual or imputable to Victory Carriers or the vessel; District Court Finding XII (Tr. 44-45):

> "The collision and resulting damage were caused solely by the joint negligence of the pilot (Garner H. Long) and of the Mate of the SEA SCOUT as aforesaid. All of Long's orders were promptly and efficiently obeyed by those on board the EMERY, and there was no fault on the part of the EMERY, her Master, officers or crew, nor can any fault be imputed to any of them under the circumstances of this case."

American courts have consistently expressed the view that the negligence of a towing company pilot engaged by a shipowner is not imputed to the shipowner. *The Cromwell* (1917) 243 Fed. 207 aff'd 4 Cir., 259 Fed. 166; *The Barendrecht* (2 Cir. 1925) 9 F. 2d 614; *The John D. Rockefeller* (4 Cir. 1921) 272 Fed. 67. See also *Griffin on Collision,* pp. 453-459. Although there is some conflict in American authority as to whether the negligence of a towing company pilot may be imputed to the vessel *in rem* (a question not presented by this case) the rule is settled that the negligence of an independent towing company pilot is not imputed to the shipowner.

The rule correctly stated on page 10 of the Court's opinion of October 22, 1959 that in mutual fault collision cases the mutual wrongdoers shall share the damages equally appears to have been erroneously carried forward by the Court and applied as between an innocent party, Victory Carriers, and a wrongdoer. The doctrine is well established in American law that where two vessels collide due to the fault of both, a damaged innocent third party may collect his full damages from a single wrongdoer, even if he has immunized one of the wrongdoers by contract. *The Chattahoochee* (1899) 173 U.S. 540; *Pennsylvania R. Co. v. The Beatrice* (1958) 161 F. Supp. 136.

Red Stack in its primary capacity as a towing company contracting the services of the tug SEA SCOUT is in precisely the same situation vis-a-vis fault-free Victory Carriers, assuming Victory Carriers bound by a pilotage clause, as were the shipowners vis-a-vis innocent cargo in *The Chattahoochee* (1899) 173 U.S. 540 and *The Esso Belgium/Nathanial Bacon* (1952) 343 U.S. 236. Like the

shipowners in those cases, in its capacity as a towing company Red Stack's contractual exemption from liability for pilot negligence cannot avail it to avoid payment of full damages for the loss to which its negligent performance of its towage contract contributed. *Bisso v. Inland Waterways Corp.* (1955) 349 U.S. 85.

The fact that Victory Carriers, an innocent party injured in its property, was damaged by concurring negligent acts of two employees of Red Stack completes the analogy to the *Chattahoochee* situation in which the cargo had, by contract, released the negligent carrying vessel from liability. If, in the present case, Victory Carriers had released Red Stack from liability for pilot negligence, such release would have availed Red Stack no better in defending Victory Carriers' claim based on tug negligence than have such contractual exemptions from liability availed the carrier in hundreds of cases in which exempt perils and carrier's negligence have concurred to cause a single loss. *The Vallescura* (1934) 293 U.S. 296.

(b) The fault of the Red Stack tug in itself imposed upon Red Stack liability for full damages to Victory Carriers.

It is further respectfully submitted that the Court erred in treating as apposite those mutual fault collision cases in which there was no contractual relationship between the owners of the two vessels. Red Stack's towing contract, apart from the pilotage service, contained an implied contractual undertaking to indemnify Victory Carriers in full for damage resulting from negligent performance by the tug SEA SCOUT of Red Stack's towage contract. The principles of *Crumady v. The Fisser* (1959) 358 U.S. 423; *Royal Mail Lines v. Peck* (9 Cir. 1959) 269 F. 2d 857

should govern, under which Victory Carriers would be entitled to full indemnity for damage contributed to by tug negligence, absent some action on the part of Victory Carriers which would bar it from such indemnity, such as contributing negligence on the part of Victory Carriers' own employees, of which there was none.

II.

THE COURT ERRED IN RULING AGAINST STATES MARINE'S CONTENTION THAT IT WAS AUTHORIZED TO BIND VICTORY CARRIERS TO A PILOTAGE CLAUSE.

The Court erred in the holding expressed on page 8 of its opinion of October 22, 1959 reading "nor was there evidence that such clauses are either universally required, or even customary." The uncontradicted evidence is that Red Stack is the only company in the San Francisco Bay Area offering a docking service (tug and pilot) (Tr. 70), that all Red Stack invoices contained a pilotage clause (Tr. 68), and that Victory Carriers itself had on prior occasions used Red Stack tugs and paid Red Stack invoices containing a pilotage clause (Tr. 79). The discussion appearing on page 8 of the Court's opinion of October 22, 1959 indicates that the Court perhaps regarded States Marine's contention that it was authorized to bind Victory Carriers to a Red Stack pilotage clause as premised primarily on Clause 2 of the charter party. In fact, as the Court may have recognized, States Marine's contention was premised equally on Clause 26, i.e., that States Marine as time charterer was authorized by the owner to secure and provide tug service (Clause 2) on terms which would not be more onerous to the shipowner than its Clause 26 undertaking "to remain responsible for navigation, etc."

III.

RED STACK'S CONDUCT BARS ITS CLAIM FOR INDEMNITY AGAINST STATES MARINE.

The general rule is that a party, such as Red Stack, seeking indemnity must exercise all reasonable good faith action to defend the original claim as to which indemnity is sought (and at least refrain from affirmatively seeking to have such liability imposed on it) failing which the putative indemnitor, States Marine, is discharged of liability. *American Surety Co. v. Ballman* (8 Cir. 1902) 115 Fed. 292 affirming 104 Fed. 634, cert. den. 187 U.S. 646. In the present case Red Stack has directed its efforts not to defend against the basic claim of pilot negligence, but on the contrary to achieve a holding that the collision resulted solely from pilot negligence (Tr. 11, 17 and Rep. Tr. 134 not printed). The impropriety of permitting indemnity in such circumstances is particularly patent in a case such as this where the party seeking indemnity, Red Stack, is the employer of the pilot upon whom the indemnitee has sought to cast sole blame for the collision.

Dated, San Francisco California,
November 16, 1959.

Respectfully submitted,

GRAHAM, JAMES & ROLPH,
FRANCIS L. TETREAULT,
Proctors for Appellant and Petitioner States Marine Corporation of Delaware.

CERTIFICATE OF COUNSEL.

I, Francis L. Tetreault, hereby certify that I am counsel for the appellant herein, that I prepared the foregoing Petition For Rehearing, that it is in my judgment well founded, and that it is not interposed for delay.

Dated, San Francisco, California,
November 16, 1959.

FRANCIS L. TETREAULT,
Of Counsel for Appellant and Petitioner States Marine Corporation of Delaware.